FILED

JUL 24 1953

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 285

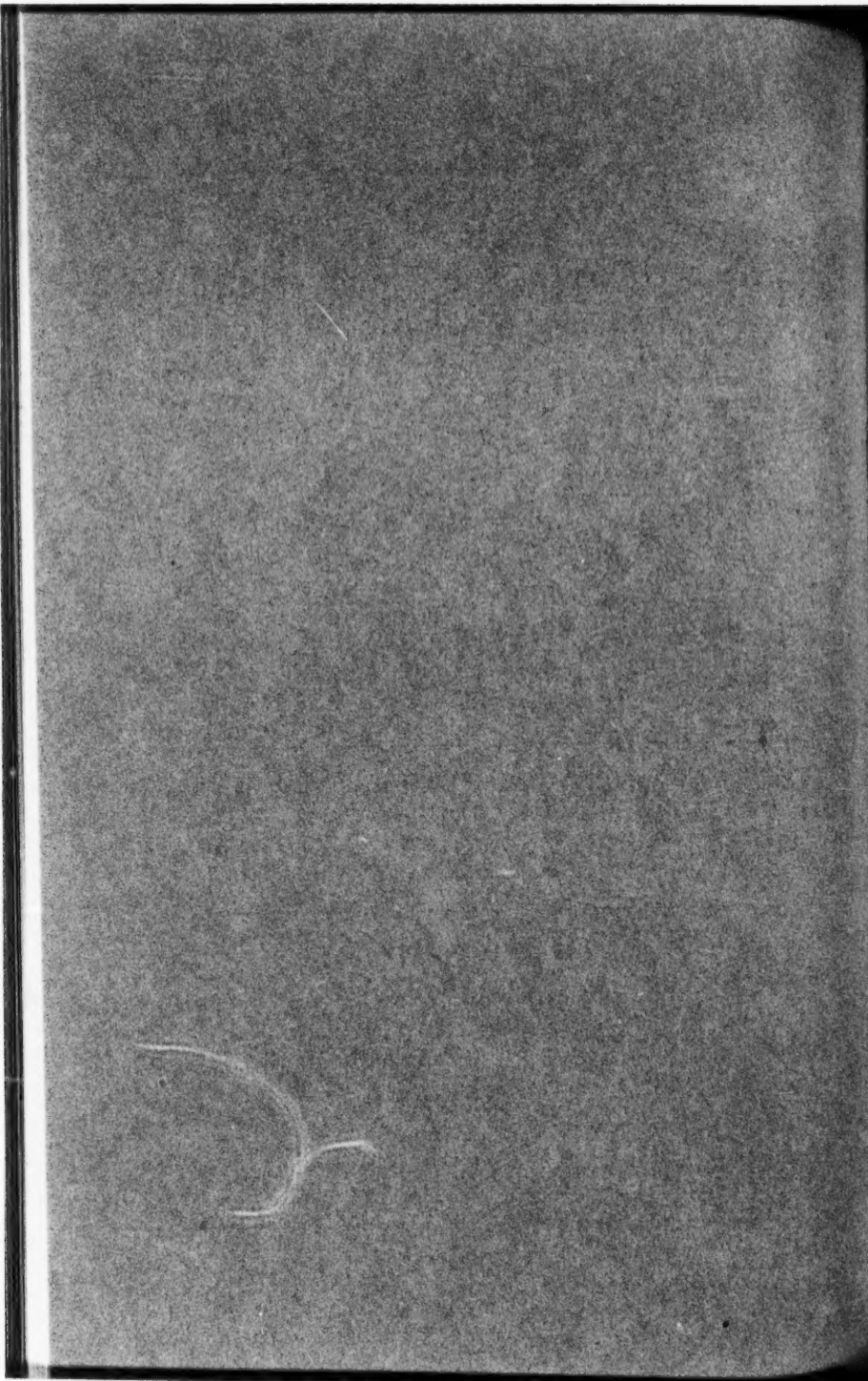
ALFRED MAINELLA,

Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



INDEX

PAGE

PETITION

Summary Statement of the Matter Involved 1

Jurisdiction to Review 2

Questions Presented 2

The Reasons Relied On for the Allowance for the Writ 5

BRIEF

Opinion of the Courts Below 11

Jurisdiction 11

Statement of the Case 12

Specification of Errors 12

Statutes and Regulations Involved 12

Argument 12

Conclusion 16

Appendix 17

CASES CITED

Direct Sales Co., Inc. v. United States, 63 S. C. 1265 ..... 6, 7, 13, 14, 15

Falcone v. United States, 311 U. S. 305 ..... 4, 7, 14

McElroy v. United States, 164 U. S. 76, 80 16

United States v. Smith, 112 Fed. (2d) 83, 85 16

STATUTES AND REGULATIONS CITED

PAGE

Revenue Act:
- Section 2550(A) 1
- Section 2551 1
- Section 2553 1
- Section 2554 1
- Section 3220 1
- Section 3221 1
- Section 3324 1

Judicial Code:
- Sections 240(a) and (c) as amended, 28 U. S. C. Section 347 2

United States Code:
- Title 18, Section 88 17
- Title 26, Section 2550(a) 17
- Title 26, Section 2551(a) 17
- Title 26, Section 2553 18
- Title 26, Section 2554(a) (c)(2) (d) (f) and (g) 19, 20
- Title 26, Section 2557(b)(1) (2) 20
- Title 26, Section 3220(a) (b) (c) (e) and (f) 21, 22
- Title 26, Section 3221(a) 22
- Title 26, Section 3224(a) (b) and (c) 22, 27
- Title 28, Section 391 13

Treasury Regulations No. 5 (1938) as follows:
- Article 3 23
- Article 15 23
- Article 25 23
- Article 62 23
- Article 90(5) 24
- Article 167 24
- Article 182 25
- Article 183 25
- Article 185 25
- Article 201 26

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

ALFRED MAINELLA,
Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of ALFRED MAINELLA respectfully shows:

I

Summary Statement of the Matter Involved

Petitioner was convicted by a jury after a trial in the United States District Court for the Southern District of New York upon an indictment (R. 10-33) charging him together with nineteen other defendants with conspiracy to violate Revenue Laws with respect to narcotics; in particular Sections 2550(A), 2551, 2553, 2554, 3220, 3221 and 3224 of the Internal Revenue Code.

The petitioner, Alfred Mainella, was sentenced to serve a term of a year and a day and to pay a fine of $1,000.

The petitioner herein appealed to the United States Circuit Court of Appeals for the Second Circuit upon various grounds fully set forth in the Assignment of Errors (R. 862-871). Upon such appeal, the Circuit Court of Appeals for the Second Circuit, by a divided opinion, affirmed the conviction of this petitioner, Alfred Mainella, and rendered its opinion upon such affirmance.

II

Jurisdiction to Review

The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein, affirming the conviction of the petitioner, Alfred Mainella, on August 3, 1943 (R. 933). By its order, the said Circuit Court of Appeals has extended the time of all the appellants, including your petitioner, Alfred Mainella, to file their petitions for certiorari to this Court, up to and including August 25, 1943. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347, subdivisions A and C, and as amended by Section 240(A) under the act of February 13, 1925, and Rule 38 of the Revised Rules (1939) of the Supreme Court of the United States. The reasons directly hereinafter further set forth constitute valid grounds for invoking the jurisdiction of this Court.

III

Questions Presented

1. Whether or not it was proper to combine in one indictment and offer in support thereof proof of three or four different conspiracies, all of which were separately different as to content, two of which were separate as to personnel, and several of which, even if proved, would

constitute no crime. The separate conspiracies, each of which the Government contended was criminal, were as follows:

A. The attempt to manufacture morphine synthetically.

B. To extract narcotics for illegitimate use from exempt narcotic preparations such as paregoric and opium lead wash.

C. To divert opium by means of a circulation through the various defendants of lead and opium wash, so that the manufacturer was claimed to have procured the return of all of the lead and opium wash manufactured by him and sold through the jobbers to the druggists and then supposedly returned to him intact. The manufacturer would then, it is claimed by the Government, show the manufacture and sales of lead and opium wash in greater quantity than actually made up and sold by him in order to enable him to secure additional raw opium to be put in the illegitimate market for direct use by drug addicts.

D. That all the defendants were in a venture to supply Liss and Conte with lead and opium wash, knowing that they meant to resell it, or that it was not to be used as medicine, or that no record should be kept of the sales, or of all these things.

The petitioner, Alfred Mainella concededly had no connection with conspiracy A and B (see Opinion of the Circuit Court of Appeals, R. 898-918). Conspiracy A, if successful, would not constitute a crime. Conspiracy C failed utterly of proof. It was never shown, directly or indirectly, that the lead and opium wash sold by the appellant Mainella to Liss and Conte, along with the lead and opium wash sold and delivered to Liss and Conte by other defendants, was ever returned or intended to be returned to the manufacturer thereof (see Opinion of the Circuit Court of Appeals, R. 898-918).

2. Whether or not there was a harmful and fatal variance between the allegations of the indictment and the proof as presented because of the foregoing, and by reason of the further contentions:

A. The jury may have confused the issues as to the appellant, Alfred Mainella.

B. The jury may have applied all the evidence adduced at the trial indiscriminately and without a proper regard to the pertinent testimony chargeable as against each separate defendant at the trial.

3. Whether or not the failure of the Trial Judge to tell the jury properly and adequately what the issues were for them to decide in this case, and whether or not the Trial Judge's instructions to the jury, being merely colloquial and consisting, in large, of a mere reading of the relevant statutes and the regulations involved, were sufficient and proper; and whether or not the finding that "the wilderness of the resulting verbiage (of the Trial Judge's charge to the jury) must have left them pretty much in the dark", do not require a finding by the Supreme Court that as a matter of law these defendants, including the petitioner, Alfred Mainella, did not have a fair and adequate trial because, in fact and in substance, there was no proper or adequate charge of the issues involved at the trial.

4. Whether or not the evidence adduced at the trial was sufficient to support a finding of guilt as to the petitioner, Alfred Mainella, and whether or not the affirmance of conviction by the Circuit Court of Appeals is not in direct conflict with applicable decisions of this Court, and particularly the decision of this Court in *Falcone* v. *United States,* 311 U. S. 305, as clarified and interpreted more fully in *Direct Sales Co., Inc.* v. *United States,* decided June 14, 1943, and reported in Supreme Court Reports, issue of July 1, 1943, 63 S. C. 1265.

IV

The Reasons Relied On for the Allowance for the Writ

A. The reasons set forth quite fully by the co-petitioners, Liss, Conte, Londoner, Fox and Cohen, whose petitions for Writs of Certiorari are to be filed simultaneously with that of this petitioner, Alfred Mainella, which are germane to and cover the substance of questions 1, 2 and 3 of the questions presented herein, are adapted as the reasons for the allowance of the Writ with respect to this petitioner, Alfred Mainella, without further repetition or argument herein, for the sake of brevity and economy. The reasons set forth in the dissenting opinion by Mr. Justice Frank herein are adopted as the grounds for the granting of this Writ with respect to reversible errors having been committed upon the trial herein with respect to all such subject matters set forth in questions 1, 2 and 3 presented herein.

B. All that was shown at the trial against the petitioner, Alfred Mainella, is substantially contained in his own free statement given to the Government agents at the time of his arrest and is set forth in pages 827 to 830 of the Transcript of the Record. The only other evidence against Mainella adduced by the Government was the testimony of its agent, Jacobs, that he took such statement and that he had little independent recollection of the matters contained therein; a concession that if Mr. Castarella, a Government agent, were recalled to the stand, he would testify that he made an inspection of petitioner's store and that he did not produce a narcotic exempt preparation book, and that he did not have any to produce (R. 587); and the introduction in evidence of certain invoices of shipments of lead and opium wash made to Alfred Mainella by various jobbers, Exhibits 17-17A (R. 888 admitted into evidence at p. 189); and Exhibit 39 (R. 89 admitted into evidence at p. 303).

That is the sum total of all the evidence adduced by the Government against the petitioner, Alfred Mainella. The facts contained in these proofs are not that clear and unequivocal proof required to show that an alleged conspirator intended "to further, promote and cooperate in a buyer's illegal use" of an exempt narcotic preparation such as the lead and opium wash involved herein. *Direct Sales Co. Inc.* v. *United States,* reported in 63 S. C. 1265, issue of July 1st, 1943, Supreme Court Reporter.

All that has been shown by the competent proof adduced against Mainella by the Government is that he, a retail druggist, at the behest of Liss, purchased and resold to Liss on seven different occasions, about 112 gallons of a limited narcotic preparation known as lead and opium wash, on the representation by Liss that it was to be used medicinally for the treatment of footsore race horses. These transactions covered a period from about May to September, 1940. Mainella inquired of his jobbers, such as the Long Island Drug Co., whether he, as a retail druggist, could sell quantities of 5 gallons of lead and opium wash to one customer at a time, and he was informed that he could because of there being no restrictions as to such sale. When Liss' demands increased even beyond his originally unusual purchases, Mainella began to doubt the propriety of such large sales of this preparation and refused to make further sales to Liss.

Concededly this preparation was a lead and opium wash, obviously a poison, used externally as a liniment only and incapable of being imbibed, or being used other than as a liniment. The Government, in rebuttal, sought by the testimony of a veterinarian to show that lead and opium wash was not commonly used as a liniment for race horses at the time involved in the indictment, although it had once been used for such a purpose; but not the slightest effort was made to connect the knowledge of such facts with the petitioner, Alfred Mainella, directly or indirectly. The statements of Mainella having been offered in evidence by

the Government itself as part of its case against him, the statements contained therein, unless clearly and forcefully shown to be untruthful and incorrect, are to be taken as part of the Government's case and proof against Mainella and not otherwise. There being no effort to refute or contradict the statements of Mainella that he made such sales to Liss in reliance upon Liss' representation that the lead and opium wash was for use upon footsore race horses, there is nothing in the Record to show that Mainella made such sales with guilty knowledge of any purported illicit use by Liss.

There is a complete absence of any evidence of criminal intent in any of the acts charged against Mainella.

As was said in the affirming opinion, "There may be doubt whether the evidence proved that the conspiracy contemplated that the sales should not be recorded", this amounts to a finding that the omission and the failure to keep any records whatsoever with respect to the sale of exempt narcotic preparations by the petitioner Mainella has not been connected with the conspiracy count alleged in the indictment on this point, and has been completely overruled as showing guilty knowledge and joinder in the conspiracy alleged in the indictment by the petitioner, Alfred Mainella, by mere reason of his failure to keep the required records.

The total effect of all the pertinent evidence against Mainella warrants a finding that he had no knowledge of any conspiracy in his sales of the lead and opium wash to Liss and that he at all times dealt with and intended to deal with these preparations only as a medicine and not for any illicit purpose, and that his conviction was without any justification under the authority of *United States* v. *Falcone*, 311 U. S. 205, and *Direct Sales Co. Inc.* v. *United States*, cited above.

C. The affirming opinion of the Circuit Court of Appeals with respect to the petitioner, Aifred Mainella, set forth

the grounds upon which it saw justification to affirm the conviction against him. The findings set forth against Mainella in this opinion are largely unfounded and not proved by the Record. This opinion states that Mainella sold large quantities—650 gallons to Liss. The only evidence with respect to sales by Mainella to Liss are as set forth hereinabove.

The testimony of the defendant Goldberg that he sold to Liss large quantities which were delivered or shipped to Liss, posing as the Frank Drug Company, to the store address of the petitioner, Alfred Mainella, was received in evidence only as against the defendant Liss and not against Mainella and cannot be used to support the conviction of the petitioner, Alfred Mainella (R. 156-159).

Similarly, the testimony of the defendants Fox that, following a telephone call, they delivered various amounts of lead and opium wash to the petitioner Mainella, was, by express ruling of the Trial Judge, admitted as to the defendants Fox only (R. 37, 38). It was, therefore, error on the part of the affirming Judges in the Circuit Court of Appeals to base their affirmance upon a finding that Mainella was chargeable with the sales of lead and opium wash referred to in the testimony of the witnesses Goldberg and Fox.

The affirming opinion further found that Mainella told a narcotic agent that two shipments of 100 gallons each, of lead and opium wash, shipped by a Providence druggist, had only been "dropped off in the alley in the rear of my store". This purported statement is taken bodily from the testimony of the Government agent, Robert Jacobs, at page 396 of the Record. However, the Court overlooked that this witness in so testifying was only attempting to give his independent recollection of the substance of the free and voluntary statement signed by Mainella preliminary to the statement itself being offered in evidence. As to the recollection of this Government agent, without referring to such statement, he was asked the following question and made this answer at page 382 of the Record:

"Q. Do you recall everything that was said at the time he came in and made the statement without looking at the paper that was signed? A. No, sir, I cannot."

In the statement made by Mainella to this Government witness Jacobs, the following statement was made by Mainella, "I have never met Dan Goldman, of Providence, Rhode Island, nor did I ever receive, as he claims, four fifty-gallon barrels of lead and opium wash, which he claims to have delivered and dropped off in the alley in the rear of my store" (R. 830). A mere reading of the pertinent parts of the Record, with respect to such testimony, it is respectfully submitted, shows in and of itself, that the Circuit Court misconstrued the testimony and the proper inferences and conclusions to be drawn therefrom with respect to the delivery by Goldman to Frank Drug Co., through Liss alone, and without any complicity of any guilty sort in such transactions on the part of the petitioner Mainella.

The further fact relied upon by the Circuit Court in affirming its conviction of the petitioner Mainella that he became "worried" over the quantities ordered by Liss, does not warrant an inference that the petitioner had guilty knowledge of an illicit use of the lead and opium wash by Liss. It might with more than equal weight, be argued that he might have become worried in the change in his status as a retail druggist in continuing to make sales of such large quantities of lead and opium wash to Liss, in that he was becoming a wholesaler or a jobber by continuing to make such large sales and nothing else. It is unreasonable to infer from such testimony that the petitioner Mainella knew of any illicit use of such lead and opium wash by Liss, or that he made such sales with intent to evade the purposes of the Harrison Anti Narcotic Act, Internal Revenue Code, 251(A), or that he made such sales with intent to further, promote and cooperate in the buyer's illegal use of such lead and opium wash.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing said court to certify and send to this Court a full and complete transcript of the records and proceedings of the said Circuit Court had in the case numbered and entitled on its Docket No. 1863, Calendar No. 223, United States of America, Appellee, v. Jack Liss, Appellant, to the end that the case may be reviewed and determined by this Court as provided for by the statute of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated, August 23, 1943.

ALFRED MAINELLA,

By.....

CHARLES V. HALLEY, JR.,
Counsel for Petitioner.